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## The Casey Martin Case: Its Possible Effects on Professional Sports

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# TULSA LAW JOURNAL

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## COMMENT

### THE CASEY MARTIN CASE: ITS POSSIBLE EFFECTS ON PROFESSIONAL SPORTS

#### I. INTRODUCTION

Until early 1998, Casey Martin was primarily known as a former Stanford University golfer and one time teammate of the immensely popular professional golfer, Tiger Woods.<sup>1</sup> Martin's recognition by the public changed when he decided to challenge the Professional Golf Association (PGA)<sup>2</sup> and its rule barring the use of golf carts during PGA tournaments.<sup>3</sup> Martin is legally handicapped as a result of a circulatory disorder in his lower right leg,<sup>4</sup> and he requested that the PGA modify its rules so that he would be allowed to use a golf cart in PGA competition.<sup>5</sup> The PGA did not allow the use of carts at the PGA tour level, and contended that it was under no legal duty to do so.<sup>6</sup> Therefore, Martin sought and won a temporary injunction

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1. Woods became one of the best known athletes in the world in 1997. He first came into the spotlight at Stanford University in 1996 where he became the first collegiate golfer to ever win three consecutive United States Amateur tournaments. Then, in 1997, Woods won the Professional Golf Association's most prestigious event, the Masters Tournament, in Augusta, Georgia. He set a record at the Masters by shooting eighteen strokes under par. Woods' Masters performance, combined with his youth, his unique ethnic heritage (including Caucasian, African-American, and Asian-American roots), and his lucrative product endorsement deals, made him one of the most well known professional athletes in the world. See Jaime Diaz, *Masters Plan* (visited Oct. 13, 1998) <<http://augustagolf.com/stories/041398/si/masterru.html>>.

2. The PGA is a "non-profit association responsible for sponsoring and cosponsoring professional golf tournaments." *Martin v. PGA, Inc.*, 984 F. Supp. 1320 (D. Or. 1998) [hereinafter *Martin I*], *aff'd*, 994 F. Supp. 1242 (D. Or. 1998) [hereinafter *Martin II*].

3. See generally *Martin I*.

4. See *Golf a la Cart*, *SPORTS ILLUSTRATED*, Dec. 15, 1997, at 33.

5. See *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1248 (D. Or. 1998) [hereinafter *Martin II*].

6. See *id.* at 1244.

allowing him to use a golf cart in the PGA's Nike Tour tournaments.<sup>7</sup>

Some players, including Martin's former college teammate Tiger Woods, voiced their disagreement with the decision.<sup>8</sup> At the heart of their protest was the possibility that allowing Martin to use a cart might give him an unfair advantage over other players.<sup>9</sup> Martin eventually became "the first professional athlete to sue successfully under the Americans with Disabilities Act" (ADA).<sup>10</sup> The world of professional sports, including sportswriters, fans, team owners, and the various professional sports leagues and associations, speculated as to how the decision in *Martin v. PGA, Inc.*<sup>11</sup> would affect the future of professional sports. Opinions ranged from the support for Martin and his position shown by many fans<sup>12</sup> and writers<sup>13</sup> to fear and anger, which came from a number of Martin's own colleagues.<sup>14</sup>

This note focuses on the *Martin* case and its possible effects on the world of professional sports. The analysis begins in Section II with a discussion of Martin's physical condition and his feelings about this condition as they relate to his need to use a golf cart. The positions of the PGA and several of its players are presented in Section III. The Americans with Disabilities Act (ADA) is discussed in Section IV, including its important elements, as well as the policy behind its genesis. Section V includes an analysis of the decision by the United States Magistrate<sup>15</sup> in the first *Martin* case (*Martin I*) and, the District Court's review of that decision in the second *Martin* case (*Martin II*) is analyzed in Section VI. Other cases involving sports and the ADA are then examined in Section VII. The "major life activity" requirement of the ADA is considered in Section VIII. Finally Section IX concludes this note with the determination that the decision in *Martin II* will not have a detrimental effect on the world of professional sports because of the unique aspects of professional golf as compared to other sports, and also due to varying public policy concerns.

## II. MARTIN'S CONDITION

Casey Martin suffers from an affliction that causes the veins in his right leg to

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7. See Joel Stein, *A Walk, Spoiled*, TIME, Jan. 26, 1998, at 77. The PGA's Nike Tour is analogous to Major League Baseball's minor league system. The Nike Tour is made up of players who did well enough in the PGA's qualifying tournament to make the Nike Tour but who did not finish strongly enough to make the PGA Tour. Players on the Nike Tour can move up to the PGA Tour either by finishing high enough in their final ranking on the Nike Tour or by finishing among the Nike Tour's top money winners.

8. See Stein, *supra* note 7.

9. See *id.*

10. *Awarded, Casey Martin*, TIME, Feb. 23, 1998, at 29 (explaining that Martin sued under the Americans with Disabilities Act, 42 U.S.C. §§ 12181-12188).

11. *Martin I*.

12. See Nick Charles, *Fairway or No Way?*, PEOPLE WEEKLY, Feb. 9, 1998, at 48, 49.

13. See generally Stein, *supra* note 7.

14. See generally Curtis Stange, *Protecting the Game*, GOLF MAGAZINE, March 1998.

15. United States Magistrate Judge, Thomas Coffin, of the Federal District Court in Eugene, Oregon, first heard this case and issued his ruling of January 30, 1998, before it was reviewed by the District Court in its decision of February 19, 1998. See Brian Doherty, *A Law That Cripples Independence*, JOURNAL OF COMMERCE AND COMMERCIAL, Feb. 19, 1998, at 6A.

swell, resulting in pain and localized clotting.<sup>16</sup> This condition makes it difficult and often painful for him to walk.<sup>17</sup> Life has not always been that way for Martin.<sup>18</sup> Although he was born with the affliction,<sup>19</sup> he was able to participate in “golf, soccer, and sandlot football”<sup>20</sup> as a boy. At the time Martin’s claim arose, however, he was twenty-five years old,<sup>21</sup> and his condition was, and still is, slowly worsening with each passing day.<sup>22</sup>

Martin’s condition is similar to Klippel-Trenaunay (KT) syndrome, “a rare congenital disorder involving complex vascular anomalies and general hypertrophy in an extremity.”<sup>23</sup> In short, the bone in Martin’s leg is deteriorating and the eventual probability of amputation lurks with each step he takes.<sup>24</sup> Martin’s doctors currently contemplate placing a rod inside his leg to help stabilize the weakened bone,<sup>25</sup> but this is only a temporary solution because there is, as of today, no cure for KT syndrome.<sup>26</sup> KT patients and others with conditions similar to Martin’s affliction wear “an elastic stocking to relieve the venous congestion and protect the limb from trauma.”<sup>27</sup> As Martin put it, “[i]f you put a gun to my head, I *could* walk. But it certainly takes a toll on me.”<sup>28</sup> Walking takes so much of a toll on Martin that he decided, rather than risk walking during PGA events, he would sue the PGA to force them to allow him to use a golf cart.<sup>29</sup> “I probably only have a certain amount of steps left in my leg,” said Martin.<sup>30</sup> “It’s either ride a cart or I’m done.”<sup>31</sup>

### III. THE POSITION OF THE PGA AND ITS PLAYERS

On July 2, 1998, Casey Martin rode his cart in the Canon Hartford Open in Cromwell, Connecticut.<sup>32</sup> In doing so, he became the first professional golfer to ride a cart in a PGA event.<sup>33</sup> The PGA’s position was that “walking remains part of championship golf.”<sup>34</sup> Indeed, PGA Tour Commissioner Tim Finchem went so far as to call walking “an integral part of the competition.”<sup>35</sup> However, the PGA does

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16. See Lisa Schnirring, *Casey Martin’s Case: The Medical Story*, THE PHYSICIAN AND SPORTSMEDICINE, April 1998 at 15.

17. See Dave Kindred, *Martin’s on Par to Prove Himself*, THE SPORTING NEWS, June 29, 1998, at 63.

18. See *id.*

19. See *id.*

20. *Id.*

21. See *id.*

22. See generally Schnirring, *supra* note 16, at 15 (noting that the possibilities of improvement for Klippel-Trenaunay patients are limited to managing symptoms and maintaining the affected limbs).

23. See *id.*

24. See Charles, *supra* note 12, at 48.

25. See Schnirring, *supra* note 16, at 16.

26. See *id.*

27. *Id.*

28. Charles, *supra* note 12, at 48.

29. See *id.*

30. *Golf a la Cart*, *supra* note 4, at 33.

31. *Id.*

32. See Alex Yannis, *Milestone No Matter to Martin*, N.Y. TIMES, July 3, 1998, at C4.

33. See *id.*

34. Charles, *supra* note 12, at 49.

35. Doherty, *supra* note 15, at 6A.

allow the use of carts in its Qualifying Tournament and on its Senior Tour.<sup>36</sup> The formal rules of golf, according to the United States Golf Association (USGA) and the Royal and Ancient Golf Club of St. Andrews, Scotland,<sup>37</sup> do not require that golfers walk.<sup>38</sup> The PGA added the walking requirement to the PGA Tour and the Nike Tour to “inject the element of fatigue into the skill of shot-making.”<sup>39</sup>

Several PGA players seem to agree that walking is an important part of the game. Professional golfer Jack Nicklaus argued that changing the rules for Martin would cause the players to “lose the game of golf forever the way we know it.”<sup>40</sup> Similarly, Curtis Strange, another member of the PGA Tour wrote that keeping walking as part of the game was a matter of “preserving the game’s integrity.”<sup>41</sup> Tiger Woods said, “[a]s a friend I’d love to see him have a cart. But from a playing standpoint is it an advantage? It could be.”<sup>42</sup> Other PGA Tour members note that Martin is not the only golfer with health problems. Scott Verplank stated that he hoped the Tour would not be forced to allow the cart and noted that “everybody’s got problems.”<sup>43</sup> Even golfers such as Blaine McCallister, who called Martin “an inspiration,” fear that if Martin gets to use a cart, many other players will claim injuries and demand carts.<sup>44</sup>

There are some players and medical experts who disagree with the PGA’s claim that walking is an important part of the game. As Australian golfer Bradley Hughes put it, the cart “is just getting him from A to B, it’s not hitting the shots for him.”<sup>45</sup> Dr. Gary Klug, an expert on fatigue, also disagrees that walking in golf has much to do with stamina.<sup>46</sup> He noted for the *Martin I* court that in playing a typical golf course, a player walks about five miles in five hours, expending about 500 calories.<sup>47</sup> Dr. Klug said this amount of calories is not significant, stating, “nutritionally it’s less than a Big Mac.”<sup>48</sup> The court in *Martin I* also disagreed with the PGA as it noted that players on the Senior Tour and in the PGA’s Qualifying Tournament who were given the option of using a cart elected to walk by a large majority.<sup>49</sup>

The PGA and its players also alluded to the fact that golfers in the past have been physically affected by having to walk rather than ride in a cart. Chief among the incidents cited occurred at the 1950 U.S. Open and the 1964 U.S. Open.<sup>50</sup> Ben Hogan, in 1950, played the U.S. Open less than a year and a half after almost being

36. Mike Purkey, *Uneasy Rider*, GOLF MAGAZINE, April, 1998, at 140, 141.

37. “The general ‘Rules of Golf’ are promulgated by the United States Golf Association (USGA) and the Royal and Ancient Golf Club of St. Andrews, Scotland.” *Martin II* at 1249.

38. *See id.*

39. *Id.* at 1250.

40. Rick Reilly, *Give Casey Martin a Lift*, SPORTS ILLUSTRATED, Feb. 9, 1998, at 140.

41. Strange, *supra* note 14, at 32.

42. Charles, *supra* note 12, at 49.

43. *Golf a la cart*, *supra* note 4, at 33.

44. *See id.*

45. *Id.*

46. *See Martin II* at 1250.

47. *See id.*

48. *Id.*

49. *See id.* at 1251.

50. *See Charles*, *supra* note 12, at 49.

killed in a car accident.<sup>51</sup> Ken Venturi became physically exhausted after playing twenty-seven holes of golf in the 1964 U.S. Open due to the intense heat, but as Martin notes, Venturi did not have any permanent affliction.<sup>52</sup> The importance of walking in professional golf and the possible alteration of the game if carts were allowed both emerged as important issues in Martin's legal battle.

#### IV. THE AMERICANS WITH DISABILITIES ACT

Martin sued the PGA under the ADA<sup>53</sup> in an attempt to force the association to alter its rule barring the use of carts in competitions.<sup>54</sup> The ADA was created because Congress noted that "some 43,000,000 Americans have one or more physical disabilities"<sup>55</sup> and that these persons have typically been subjected to discrimination.<sup>56</sup> The members of Congress noted that the discrimination which persons with disabilities face is "a serious and pervasive social problem."<sup>57</sup> Further, Congress noted that the "failure to make modifications to existing facilities and practices, exclusionary qualifications standards and criteria"<sup>58</sup> had operated to discriminate against disabled persons. The authors of the ADA considered this discrimination a "history of purposeful unequal treatment."<sup>59</sup> They proposed that the United States should strive to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."<sup>60</sup> The language of the ADA also reflects Congress's belief that the failure to act to end discrimination would be to "den[y] people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous."<sup>61</sup>

The ADA was created under Congress' commerce clause power<sup>62</sup> and applies to "public accommodations," but the "definitions" section of the ADA notes that: "private entities are considered public accommodations . . . if the operations of such entities affect commerce."<sup>63</sup> Golf courses are included in the ADA's list of "public accommodations."<sup>64</sup> The "general rule" of the ADA reads that: "[n]o individual shall be discriminated against on the basis of disabilities in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."<sup>65</sup> Under the ADA, the "failure to make reasonable

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51. *See id.*

52. *See id.*

53. 42 U.S.C. §§ 12101-12213 (1994).

54. *See generally Martin I.*

55. 42 U.S.C. § 12101(a)(1).

56. *See id.* § 12101(a)(2).

57. *Id.*

58. *Id.* § 12101(a)(5).

59. *Id.* § 12101(a)(7).

60. *Id.* § 12101(a)(8).

61. 42 U.S.C. § 12101(a)(9) (1994).

62. *See id.* § 12101(b)(4).

63. *Id.* § 12181(7).

64. *See id.* § 12181(7)(L).

65. *Id.* § 12182(a).

modifications . . . when such are necessary to afford such goods, services, facilities, privileges, or advantages, or accommodations to individuals with disabilities”<sup>66</sup> is considered discrimination.<sup>67</sup> An entity can avoid liability under the ADA, however, if it can show that the modification “would fundamentally alter”<sup>68</sup> that entity or its purposes. Another way an entity can avoid liability under the ADA is to show that it falls under the statute’s exemption for private clubs and religious organizations.<sup>69</sup> At trial, the PGA relied on both the “reasonable modification” and private entity exemptions.<sup>70</sup>

## V. *MARTIN V. THE PGA*, PART ONE

In January of 1998, a federal district court in Oregon began to hear a case<sup>71</sup> that may eventually have a major effect on the world of professional sports. Professional golfer Casey Martin went to court seeking an injunction that would allow him to use a golf cart in a PGA qualifying tournament.<sup>72</sup> The PGA’s rules did not allow for the use of carts during the third and final stage of this qualifying tournament.<sup>73</sup> Martin brought suit under the ADA, claiming that the PGA’s rule against golf carts violated the Act.<sup>74</sup> After the court issued a temporary injunction enjoining the PGA from disallowing carts during the third stage of the qualifying tournament, the PGA moved for summary judgment.<sup>75</sup> The PGA argued that the ADA did not apply to it because: 1) it is a private establishment;<sup>76</sup> 2) its tournaments are not places of public accommodation;<sup>77</sup> 3) the Nike tour does not constitute a course or examination;<sup>78</sup> and 4) that, under the ADA definition,<sup>79</sup> Martin is not a PGA employee.<sup>80</sup>

### A. *Private Establishments under the ADA*

Whether or not an entity is defined as a private establishment is of great importance under the ADA. The ADA looks to the 1964 Civil Rights Act<sup>81</sup> to determine what constitutes a private establishment.<sup>82</sup> If an entity falls under the

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66. *Id.* § 12182(b)(2)(A)(ii).

67. *See* 42 U.S.C. § 12182(b)(2)(A) (1994).

68. *Id.* § 12182(b)(2)(A)(ii).

69. *See id.* § 12187.

70. *See generally Martin I.*

71. *See generally id.*

72. *See id.* at 1322.

73. *See id.*

74. *See id.*

75. *See id.*

76. *See* 42 U.S.C. § 12187 (1994) (providing an exemption for private clubs).

77. *See id.* § 12182 (stating that the prohibition against discrimination applies to public accommodations).

78. *See id.* § 12189 (stating that the prohibition against discrimination applies to persons offering examinations or courses which relate to participation in that organization).

79. *See id.* § 12112(a) (stating that the prohibition against discrimination applies to employers).

80. *See Martin I* at 1323.

81. Civil Rights Act of 1964, 42 U.S.C. § 1981 (1994).

82. *See Martin I* at 1323.

private establishment distinction, it is exempt from the ADA, and Martin would, therefore, have no cause of action against the PGA under the ADA.<sup>83</sup> The court began its analysis of the PGA's status by noting that "the Tour is an organization formed to promote and operate tournaments for the economic benefit of its members, a highly skilled group of professional golfers."<sup>84</sup> The court distinguished *Welsh v. Boy Scouts of America*<sup>85</sup> where the Boy Scouts<sup>86</sup> was held to be a private club. The court noted that a method for discerning whether an organization is the type of private club intended by Congress to be protected was the "nexus between the organization's purpose and its membership requirements."<sup>87</sup> The court in *Welsh* found that an integral part of the Boy Scouts' purpose required belief in God and that it was a legitimate interest to require that its prospective members believe in God.<sup>88</sup> The PGA argued that its eligibility requirements and its selectivity of members gave weight to its argument that it was a private club.<sup>89</sup> The court, however, noted that the PGA's requirements are "not designed to screen out members based upon social, moral, spiritual, or philosophical beliefs, or any other criteria used to protect freedom of associational values which are at the core of the private club exemption."<sup>90</sup> The court then found that the PGA was not the type of organization meant by Congress to be protected as a private club.<sup>91</sup>

#### B. Places of Public Accommodation under the ADA

The PGA contended that its tournaments were not places of public accommodation and were not subject to the ADA requirements.<sup>92</sup> As previously noted, the ADA sets out a list of "public accommodations," and expressly includes golf courses in that list.<sup>93</sup> The PGA argued that, because the public is not allowed on the area of its courses made accessible to players, those "playing areas" are not places of public accommodation.<sup>94</sup> The court rejected this argument, noting that creating areas requiring ADA compliance and other areas not requiring such compliance would "relegate the ADA to hop-scotch areas."<sup>95</sup> The court could find no evidence of any intent to allow such zones of compliance and noncompliance<sup>96</sup> and

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83. *See id.*

84. *Id.*

85. 993 F.2d 1267 (7th Cir. 1993).

86. The Boy Scouts of America is an organization consisting of over five million members which is involved in recruiting future quality leaders of society. The purpose of the Boy Scouts is to equip youth of all races, colors, and creeds to fulfill their duty to God, to mature personally, and to help others. *See Martin I* at 1324 (quoting *Welsh*, 993 F.2d at 1277).

87. *Martin I* at 1324 (quoting *Welsh*, 993 F.2d at 1277).

88. *See id.* at 1324 (construing *Welsh*, 993 F.2d. 1267).

89. *See id.* at 1324-25.

90. *Id.* at 1325.

91. *See id.* at 1326.

92. *See id.*

93. *See* 42 U.S.C. § 12181(7)(L) (1994).

94. *See Martin I* at 1326.

95. *Id.* at 1327.

96. *See generally id.* at 1326.



noted that to allow such an interpretation would allow organizations deemed not to be private to get around the ADA by designating certain areas as being reserved for members only.<sup>97</sup> The PGA's position that its courses were not places of public accommodation was, therefore, denied.<sup>98</sup>

The court denied the PGA's motion for summary judgment and granted Martin's motion for partial summary judgment with regard to the issues of the applicability of the ADA to the PGA's courses.<sup>99</sup> The court left the following issues for determination at the trial of this case: (1) whether Martin was an employee of the PGA, (2) whether the Nike Tour was an examination or course under the ADA,<sup>100</sup> and (3) whether a ruling striking down the PGA's no-cart rule would be a fundamental alteration of the game.<sup>101</sup>

Before the ruling in this initial *Martin* decision, the court issued a temporary injunction allowing Martin to use a cart in the third round of the PGA's qualifying school.<sup>102</sup> The PGA then allowed all golfers to use a cart in this third round.<sup>103</sup> Martin, however, had done well enough in this qualifying tournament to advance to the PGA's Nike Tour, a tour just below the PGA Tour and where, like the PGA Tour, carts were not allowed at any time.<sup>104</sup> By qualifying for the Nike Tour, Martin would have a chance to advance to the PGA Tour but would, because of his affliction, need to use a cart.<sup>105</sup> Less than three weeks after the court's summary judgment rulings, the federal district court made its final determination on Martin's ADA claim.<sup>106</sup>

## VI. *MARTIN V. THE PGA*, PART TWO

Perhaps the idea of a professional golfer using a golf cart in competition should not be so controversial. After all, golf is known as not just a sport for the young, strong, and healthy. It is generally considered to be a "lifetime sport" that can be enjoyed by young and old alike. Unlike baseball, football, or hockey, a seventy-year-old golfer could go out on a course on any given day and dominate a lesser-experienced, but younger, player. Perhaps that is why such a public outcry occurred when the PGA decided not to alter its rule banning carts and, instead, elected to defend its position in court. Indeed, it is likely that much of the public never considered the fact that the PGA even had a no-cart rule until the case hit the headlines. Many fans and golfers, both amateur and professional, were stunned by the fact that the PGA was not willing to allow an exception to its rule for Martin.

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97. *See id.*

98. *See id.* at 1327.

99. *See Martin I* at 1327..

100. *See id.*

101. *See Martin II* at 1242.

102. *See Martin I* at 1322.

103. *See id.*

104. *See id.*

105. *See id.*

106. *See generally Martin II* at 1242.

This swell of support for Martin's position was also perhaps due to the perception many have of golf. After all, in a sport where an older, poorer conditioned grandmother has a legitimate chance of beating her younger and stronger grandson, it is easy to understand why many do not think of golf as a sport requiring great physical conditioning. This point is important because, while the reasoning in *Martin II* involved traditional legal analysis,<sup>107</sup> much of it also dealt with the issue of whether the walking aspect of the game was really of great importance to the game's purpose.<sup>108</sup> The court studied the reasoning behind the PGA's walking rule and whether modification of it would be an unreasonable modification of the game of golf as played in the PGA.<sup>109</sup> Put another way, would allowing Martin to use a cart "fundamentally alter PGA and Nike Tour golf competitions?"<sup>110</sup> Although the legal issues would ultimately decide the case, so too would this common-sense analysis of the nature of PGA golf.

#### A. Preliminary Rulings by the Court

Before discussing whether disallowing the no-cart rule would fundamentally alter the game of professional golf as played in the PGA, the court first ruled for the PGA on the issues of whether Martin was an employee and whether the Nike Tour was a course or examination.<sup>111</sup> The PGA did not contest either Martin's condition or the fact that it severely hampered his ability to walk the distance required in a typical PGA event.<sup>112</sup> Rather the PGA took the position that the ADA did not apply to it and that, even if it did, the alteration of its no-cart rule would be a fundamental one.<sup>113</sup> The court found in *Martin I* that the PGA's position that the ADA did not apply to that organization was incorrect.<sup>114</sup> The second assertion, that disallowing the PGA's walking requirement would constitute a fundamental alteration of the game, was decided by the court in *Martin II*.<sup>115</sup>

#### B. The Fundamental Alteration Defense

The fundamental alteration defense is available so that businesses and other organizations are not forced to make modifications for the disabled that "would result in an undue hardship to the entity."<sup>116</sup> In making this point, the court gave the example of a blind customer of a bookstore demanding that the bookstore carry books

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107. See generally *id.*

108. See generally *id.* In *Martin II*, one of the issues was whether allowing Martin to use a cart was a reasonable accommodation as required under the ADA. See *Martin II* at 1246.

109. See *id.*

110. *Id.* at 1249.

111. See *Martin II*, at 1247 (granting the defendant's motion for summary judgment on these two issues, incorporating the defendant's memo by reference).

112. See *id.* at 1244.

113. See *id.*

114. See *Martin I* at 1223-26.

115. See *Martin II* at 1244.

116. *Id.*

in braille.<sup>117</sup> The bookstore would not be required to do so because forcing them to carry books in braille when they ordinarily did not do so would constitute a fundamental alteration of the "nature of its business."<sup>118</sup> The PGA cited cases where school districts having rules regulating the age of its players were sued under the ADA.<sup>119</sup> The courts in those cases found that waiving such rules for certain individuals was not required because such a waiver would be a fundamental alteration of the schools' programs.<sup>120</sup>

The PGA, in its own analysis of these cases, encouraged the court to "focus on whether an athletic rule is 'substantive'—i.e., a rule which defines who is eligible to compete or a rule which governs how the game is played."<sup>121</sup> The *Martin II* court, however, disagreed with the PGA's attempt to frame the issues in such a manner.<sup>122</sup> The court spoke, instead, of its "independent duty to inquire into the purpose of the rule at issue, and to ascertain whether there can be a reasonable modification made to accommodate plaintiff without frustrating the purpose of the rule, and without altering the fundamental nature of PGA Tour competition."<sup>123</sup> The court further noted that the ADA makes no distinction in its application just because an entity happens to be sports-related; the reason being that handicapped persons have just as strong a desire to be free from prejudice in a sports setting as they do in any other situation.<sup>124</sup>

The *Martin II* court began its analysis of whether striking down the no-cart rule would be unreasonable by noting that the official rules of golf have no such rule.<sup>125</sup> The National Collegiate Athletic Association<sup>126</sup> and Pacific Athletic Conference<sup>127</sup> both allow the use of carts for disabled persons.<sup>128</sup> Although this evidence seems convincing, it is still the plaintiff who must prove that any requested modification of the rules is a reasonable one.<sup>129</sup> In doing so, the plaintiff need only show that "the

117. See *id.* at 1244-45.

118. *Id.* at 1245.

119. See *id.* (citing *McPherson v. MHSAA*, 119 F.3d 453 (6th Cir. 1997); *Sandison v. MHSAA*, 64 F.3d 1026 (6th Cir. 1995); and *Pottgen v. MSHSAA*, 40 F.3d 926 (8th Cir. 1994)). In each of these cases student athletes, who were older than their classmates, attempted to participate in the school sponsored sports with students who were in the same high school but who were younger and, often, physically smaller. In all three cases, the courts found that the abandonment of criteria based on age or the number of semesters completed would fundamentally alter the nature of the programs. *Martin II* at 1245. In *Pottgen*, the court also found that a program which individually assessed each student's situation with regard to the age limitation "was inappropriate." *Martin II* at 1245 (construing *Pottgen*, 40 F.3d at 926).

120. See *Martin II* at 1245.

121. *Id.* at 1246.

122. See *id.*

123. *Id.*

124. See *id.*

125. See *id.* at 1249.

126. The National Collegiate Athletic Association (NCAA) is a body that governs collegiate athletic competition among most major colleges and universities.

127. The Pacific Athletic Conference (PAC-10) is a body consisting of ten member teams organized to govern athletic competition among the schools those ten teams represent. The PAC-10 includes Stanford University, where Martin played golf with Tiger Woods.

128. See *Martin II* at 1248.

129. See *id.*

requested modification is reasonable in the general run of the cases.”<sup>130</sup> In its holding that permitting carts was not unreasonable, *Martin II* relied heavily on the fact that the official rules of golf contained no provision disallowing the use of carts.<sup>131</sup> In fact, the PGA, when it allows carts for the Senior Tour and the first two rounds of the qualifying school, “imposes no handicap system or stroke penalties on those who opt for carts as opposed to those who elect to walk.”<sup>132</sup>

The court also analyzed Martin’s particular set of circumstances and the attempts he had made to play without a cart prior to filing suit against the PGA.<sup>133</sup> The PGA did not favor an individualized study of Martin’s particular set of circumstances,<sup>134</sup> but the court noted that prior case law suggested that the better alternative was a “highly fact-specific” analysis.<sup>135</sup> In analyzing Martin’s particular condition, the court heard the testimony of his physician, Dr. Donald Jones.<sup>136</sup> Dr. Jones urged that it was “medically necessary for Casey Martin to be permitted a cart it [sic] he is to play the game of golf.”<sup>137</sup> Dr. Jones also noted that he and Martin tried many different alternatives to Martin using a cart, including leg braces, physical therapy, and shoe inserts.<sup>138</sup> Unfortunately, none of these methods was successful, and Dr. Jones testified that Martin rarely was able to complete eighteen holes of golf because of the pain walking caused.<sup>139</sup>

Since the PGA argued that its walking requirement was in place to bring fatigue into play, as well as the more generally thought of shot difficulty, the court again looked to Martin, specifically, to see whether riding in the cart would give him an unfair advantage over other golfers.<sup>140</sup> As noted earlier, physiology expert Dr. Klug testified for the court that the amount of energy typically “expended in walking a course of golf” is not great and that “the golfers have numerous intervals of rest and opportunities for refreshment (or calorie replacement).”<sup>141</sup> Dr. Klug also disputed the assertion by the PGA and some of its players that, under certain heat conditions, Martin would have an advantage as Dr. Klug noted that “fatigue at lower intensity exercise is primarily a psychological phenomenon . . . [s]tress and motivation are the key ingredients here.”<sup>142</sup>

130. *Id.* at 1248 (quoting *Johnson v. Gambrinus Co.*, 116 F.3d 1052, 1059 (5th Cir. 1997)).

131. *See Martin II* at 1248.

132. *Id.*

133. *See id.* at 1249.

134. *See id.*

135. *Id.* (quoting *Crowder v. Kitagawa*, 81 F.3d 1480, 1486 (9th Cir. 1996)).

136. *See Martin II* at 1244.

137. *Id.*

138. *See id.* at 1249-50.

139. *See id.* at 1250 (noting that Dr. Jones escorted Martin on a round of golf in 1996 to “observe some characteristics of [Martin’s] gait that would allow [Dr. Jones] to provide [Martin] with some form of stabilizing device” for his leg).

140. *See id.* at 1250 (accepting the PGA’s proposition that the no-cart rule was in effect to test the stamina of professional golfers).

141. *Id.*

142. *See Martin II* at 1251 (noting the testimony of Dr. Klug during which he gave the examples of an individual in rush hour traffic exerting little, if any, energy yet becoming extremely fatigued while, at the same time, an individual exhausted from riding a bicycle, and seemingly unable to continue, could become instantly re-energized at the promise of \$1,000 for completion of the task).

Even with a golf cart, Martin would still have to walk approximately one-fourth of the course, or about one and one-quarter miles.<sup>143</sup> This computation represents the distance that Martin must still walk to and from his cart in order to get to his ball and take his swing or sink his putt.<sup>144</sup> The *Martin II* court took into consideration the fact that much of the fatigue a golfer experiences on the golf course is due to stress and the pressure to do well, along with the fact that Martin has the *additional* worry of serious injury hanging over his head at every moment he is not riding in his cart.<sup>145</sup> Additionally, the court took notice of the fact that most golfers, when given a choice, elect to walk and made the inference that walking must not be tiring enough to affect one's play or the golfers would elect to ride in carts.<sup>146</sup>

The *Martin II* court looked at several other PGA rules to make the point that Martin could be allowed to use a cart without fundamentally altering the PGA.<sup>147</sup> The first rule the court looked at was PGA Rule 6-4 which allows players to have only one caddie.<sup>148</sup> Rules 8 and 8.1 limit the giving of advice to players during competition.<sup>149</sup> The court inquired as to whether these rules could be altered in order to assist a blind golfer.<sup>150</sup> The USGA provides a pamphlet dealing with the rules of golf and how they can be modified in order to accommodate disabled golfers.<sup>151</sup> The pamphlet suggests that the rule allowing only one caddie per golfer should be altered for blind golfers to allow them to have both a caddie and a coach who can assist the golfer in activities such as taking their stance.<sup>152</sup> The court made the analogy that since the PGA takes into account a blind golfer's individual circumstances (i.e., his blindness), it should likewise take into consideration Martin's individual circumstance, his leg ailment.<sup>153</sup> Taking into consideration the fact that the level of fatigue involved in walking a golf course is minimal, the additional fatigue and stress Martin personally experiences, and the fact that most golfers elect to walk rather than ride in golf carts, the *Martin II* court held that allowing Martin to walk would not be a fundamental alteration of PGA golf.<sup>154</sup>

## VII. OTHER CASES APPLYING THE ADA TO SPORTS AND SPORTS LEAGUES

In *Martin I*, the application of the ADA to the PGA turned on whether or not its tournaments were considered places of public accommodation as required under

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143. *See id.*

144. *See id.*

145. *See id.* at 1251-52.

146. *See id.* at 1251 (noting, in footnotes 12 and 13, the testimony of Nike Tour golfer Eric Johnson, who stated that golfers are afforded ample time to recover from the tiring effect of walking before hitting their shots and that walking also eases the effect of changing temperature and gives golfers a better feel for the weather conditions).

147. *See Martin II* at 1252.

148. *See id.*

149. *See id.*

150. *See id.*

151. *See id.*

152. *See id.* at 1252-53.

153. *See Martin II* at 1253.

154. *See id.*

the ADA.<sup>155</sup> The court ruled that golf courses were specifically included on the ADA's list of public accommodations and that such places of public accommodation could not be carved up into zones of compliance and noncompliance.<sup>156</sup> Other cases have also involved rulings as to whether various sports entities involve places of public accommodation.

#### A. *Stoutenborough v. The National Football League*

One of the cases involving sports entities, *Stoutenborough v. National Football League, Inc.*,<sup>157</sup> considered an association of disabled persons suing the National Football League (NFL).<sup>158</sup> In *Stoutenborough*, a group called Self-Help for Hearing Impaired Persons filed a class action lawsuit against the NFL and various television networks and local stations alleging that the NFL's "blackout rule" unfairly discriminated against them under the ADA.<sup>159</sup> The NFL's blackout rule "prohibits the live local broadcast of home football games that are not sold out seventy-two hours before game-time."<sup>160</sup> The district court granted each of the defendants' motions for summary judgment.<sup>161</sup> The plaintiffs in *Stoutenborough* argued that the blackout rule discriminated against them because, as deaf persons, they had no other way of enjoying the football games facilitated by some form of "telecommunication technology."<sup>162</sup> In order for the plaintiffs to have a viable claim, however, they would have to satisfy the public accommodation requirement under the ADA.<sup>163</sup> The court noted that the plaintiffs were trying to procure something that "does not involve a 'place of public accommodation,'" that is, a television broadcast of an NFL game.<sup>164</sup> The *Stoutenborough* court explained that the fact that the football games were played in a place of public accommodation and can likewise be enjoyed via television in other places of public accommodation does not mean that the plaintiffs satisfy the public accommodation requirement of the ADA.<sup>165</sup>

Although the *Stoutenborough* case did not involve a disabled athlete claiming that he was denied access to participating in sports in violation of the ADA, it is

155. See generally *Martin I.*

156. See *id.* at 1326.

157. 59 F.3d 580 (6th Cir. 1995) (affirming the district court's ruling for the defendants on a motion for summary judgment).

158. The National Football League consists of thirty-one professional football teams in the United States. Its teams are organized into one sixteen-team conference and one fifteen-team conference (the American Football Conference and the National Football Conference, respectively), each consisting of three divisions (the Western, Central, and Eastern Divisions). Each of these thirty-one teams competes against opposing teams from both conferences in a sixteen game, regular season schedule. Six teams from each conference then compete against each other in a playoff system culminating in the championship game, known as the Super Bowl. Preseason, regular season, and playoff games are all played in host cities where games can be seen live by fans and are, at the same time, broadcast on television and radio across the globe.

159. See *Stoutenborough*, 59 F.3d. at 581.

160. *Id.* at 582.

161. See *id.*

162. *Id.*

163. See *id.* at 583.

164. *Id.*

165. See *Stoutenborough*, 59 F.3d. at 583.

significant that the court did not rule that an NFL *stadium* was not a place of public accommodation.<sup>166</sup> In fact, the court ruled that NFL games are played in places of public accommodation.<sup>167</sup> The weakness in the plaintiffs' claim in *Stoutenborough* was that they attacked conduct that was merely related to the public accommodation indirectly.<sup>168</sup> It would seem that from these admittedly narrow facts, a disabled athlete suing the NFL under the ADA could at least clear the "public accommodations" hurdle.

#### B. Elitt v. U.S.A. Hockey

Another case involving the ADA and athletics is *Elitt v. U.S.A. Hockey*.<sup>169</sup> *Elitt* provides a different analysis of the public accommodations requirement than either *Martin I* and *II* or *Stoutenborough*. The plaintiff in *Elitt* was a child who had Attention Deficit Disorder (ADD)<sup>170</sup> and severe language and communications problems.<sup>171</sup> *Elitt* sued a local hockey league<sup>172</sup> for the right to participate as a player.<sup>173</sup> *Elitt*, because of his disabilities, wished to have either his father or one of his brothers on the ice with him during practices and scrimmages.<sup>174</sup> He also requested that he be able to play in a division with younger players.<sup>175</sup> U.S.A. Hockey maintained that allowing *Elitt* to have someone on the ice to help him would be a distraction and other teams would not compete with his team if that were allowed.<sup>176</sup> The league also argued that allowing *Elitt* to play in a division with younger players would put those players in danger because of their smaller size, thereby preventing U.S.A. Hockey from being able to obtain insurance.<sup>177</sup>

166. *See id.*

167. *See id.*

168. *See id.*

169. 922 F. Supp. 217 (E.D. Mo. 1996).

170. Attention Deficit Disorder is "a syndrome of learning and behavior problems that is not caused by any serious underlying physical or mental disorder and is characterized esp[ecially] by difficulty in sustaining attention, by impulsive behavior (as in speaking out of turn), and usu[ally] by excessive activity." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 74 (10th ed. 1993).

171. *See Elitt*, 922 F. Supp. at 218.

172. The hockey league, U.S.A. Hockey, is a nation-wide amateur hockey league recognized by the United States Olympic Committee. At the time of the *Elitt* case, it consisted of over 4,000 persons, including players, coaches, and game officials. The league divides players into three groups by age: (1) Mini-Mite and Mite for six to seven year-olds, (2) Squirt for eight and nine year-olds, and (3) Pee-Wee for ten and eleven year-olds. The team Mark *Elitt* wished to be a member of was the Creve Coeur Hockey Club in Creve Coeur, Missouri. The Creve Coeur Hockey Club was a member of U.S.A. Hockey.

173. *See id.*

174. *See id.* at 218.

175. *See id.*

176. *See id.* at 222.

177. *See id.* There was testimony in *Elitt* that the plaintiff was unable to focus without the help of his brothers or father and that he actually might pose a risk of harm to himself and other players if he were to be on the ice alone. Further, several hockey coaches and players testified that they had never heard of a player being allowed to play "down" a level. Both those who observed *Elitt* play, and those who did not, agreed that his size was a potential problem as the players in the younger divisions were obviously smaller.

In its analysis of the required showing of discrimination by a place of public accommodation, the *Elitt* court emphasized the fact that the plaintiff was not actually denied entrance to a public accommodation—the ice skating rink.<sup>178</sup> Rather, the court made the distinction between being denied access to a hockey league and being denied entrance to the actual rink itself.<sup>179</sup> The court analyzed the ADA's definition of public accommodation<sup>180</sup> and concluded that membership organizations, such as the hockey league, are not included in that definition.<sup>181</sup> The court further found that the listed categories were not “sufficiently similar” to membership organizations to allow them to be considered ADA public accommodations.<sup>182</sup> The court, therefore, failed to note the obvious difference between *Elitt* being able to enter the rink as a participant and being able to enter the rink as a spectator. This failure on the part of the court raises a potential problem for a would-be plaintiff suing a sports league for the right to participate as a disabled athlete. For example, if a court followed the logic of *Elitt*, it would deny a disabled football player the right to sue the National Football League for the failure to make reasonable accommodations if the NFL could show that the disabled athlete was not prevented from entering an NFL stadium as a spectator.

### C. Cortez v. National Basketball Association

A similar case where a group of disabled persons sued a professional sports league is *Cortez v. National Basketball Ass'n*.<sup>183</sup> In *Cortez*, a group of hearing-impaired and deaf persons brought suit against the National Basketball Association (NBA),<sup>184</sup> the San Antonio Spurs,<sup>185</sup> and Alamodome, Inc., the owner of the arena in which the Spurs play.<sup>186</sup> The plaintiffs in *Cortez* alleged that the defendants were in violation of the ADA in that they failed “to provide interpretative and captioning services, as a reasonable accommodation, for deaf and heard [sic] of hearing individuals who attend NBA games at the Alamodome and other arenas.”<sup>187</sup>

The NBA petitioned the court for its dismissal under Federal Rule of Civil

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178. See *Elitt*, 922 F. Supp. at 223.

179. See *id.*

180. 42 U.S.C. § 12181(7) (1994).

181. See *Elitt*, 922 F. Supp. at 223 (construing the “definitions” section of the ADA, which sets out twelve different types of public accommodations).

182. See *id.*

183. 960 F. Supp. 113 (W.D. Tex. 1997).

184. The NBA, like the NFL, is a professional sports league consisting of different teams organized into two conferences (the Western and Eastern Conferences). The NBA differs in organization from the NFL in that the NBA has twenty-nine teams and only four divisions. Like the NFL, the NBA has a preseason, regular season, and playoffs, culminating in a World Championship. NBA fans, like NFL fans, can enjoy games in person or through the television and radio broadcast of these games around the world.

185. The Spurs are a member of the NBA's Midwest Division in the Western Conference.

186. See *Cortez*, 960 F. Supp. at 114.

187. *Id.*



Procedure 12(b)(6)<sup>188</sup>—“failure to state a claim upon which relief can be granted.”<sup>189</sup> The NBA reasoned that it was not governed by the ADA because it “does not own, lease, or operate the Alamodome.”<sup>190</sup> Under the ADA, only persons that are owners, lessors, lessees, or operators of a place of public accommodation can be sued for discriminating against persons with disabilities in a given place of public accommodation.<sup>191</sup> In *Cortez*, it was not disputed that the NBA did not own or lease the Alamodome.<sup>192</sup> The court noted that the NBA, as a franchisor, could be held liable under the ADA if it could be shown that it operated the Alamodome.<sup>193</sup> In analyzing franchisor-franchisee relationships, control by the franchisor can be found where the franchisor “specifically controls the modification of the franchises to improve their accessibility to the disabled.”<sup>194</sup>

The court in *Cortez* looked to the NBA’s Facility Standards<sup>195</sup> in order to determine whether or not the NBA controlled the Alamodome with regard to its accessibility by disabled persons.<sup>196</sup> Since the court found that the NBA’s Facility Standards contained “no requirements or guidelines concerning spectator areas or the use of audio/visual systems such as scoreboards and other products which [the] plaintiffs want[ed] modified to accommodated them,”<sup>197</sup> it found that the NBA’s franchise agreement did not govern the conduct complained of by the plaintiffs in this case.<sup>198</sup> The court then held that the NBA was not an operator of a place of public accommodation.<sup>199</sup> Such an analysis, if followed uniformly by courts, could be hostile to a disabled athlete-plaintiff seeking to bring suit against a league for an alleged discrimination relating to the structure of an arena or stadium.

The plaintiffs in *Cortez* also argued that “besides the physical structures of the venues themselves, the games offered or sold as entertainment to the public by the NBA must comply with Title III of the ADA as well. . .”<sup>200</sup> According to the plaintiffs, the NBA would then be required to make sure all arenas hosting NBA teams did not discriminate on the basis of disability.<sup>201</sup> The court applied the franchisor-franchisee test in its holding that the NBA did not fall under the ADA as it was not shown to own, lease, or operate a public accommodation.<sup>202</sup> Interestingly,

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188. FED. R. CIV. P. 12(b)(6).

189. *See id.*

190. *Cortez*, 960 F. Supp. at 114.

191. *See id.* at 115.

192. *See id.* at 114.

193. *See id.* at 115.

194. *Id.* (quoting *Neff v. American Dairy Queen Corp.*, 58 F.3d 1063 (5th Cir. 1995)).

195. The NBA Facility Standards is a set of guidelines issued by the NBA in October of 1995 and consisting of thirty-five pages of minimum standards that NBA arenas should meet. *Cortez*, 960 F. Supp. at 115.

196. *See Cortez*, 960 F. Supp. at 115-16.

197. *Id.* at 116.

198. *See id.*

199. *See id.* at 117.

200. *Id.* at 116.

201. *See id.* at 117.

202. *See Cortez*, 960 F. Supp. at 117.

the court engaged in very little analysis of its decision on this issue.<sup>203</sup> Applying the ADA to a game itself is an area which has yet to be explored in ADA cases and is certainly relevant to a discussion of how the *Martin* case may or may not affect the world of professional sports. *Cortez* ignored the plaintiffs' theory, and instead, relied on its earlier finding that the NBA was not an owner, lessor, lessee, or operator of a place of public accommodation.<sup>204</sup> The court granted the NBA's motion to dismiss after finding that the NBA did not fall under the ADA.<sup>205</sup>

While the court in *Cortez* failed to discuss at any length the question of whether or not a nonphysical location (i.e. the "game" itself) can be a place of public accommodation, it did not respond in the negative. Another case where the court upheld a similar ruling is *Bowers v. National Collegiate Athletic Ass'n*.<sup>206</sup> In *Bowers*, the court noted that the Third Circuit had "recently held . . . that a public accommodation within the meaning of 42 U.S.C. § 12181(7) is a physical place."<sup>207</sup> In its finding, the court relied on both the legislative history of the ADA and the "plain meaning" of the statute.<sup>208</sup> Although the court found that the National Collegiate Athletic Association (NCAA) was not a place of public accommodation itself, it found that the NCAA, like the NBA in *Cortez*, could possibly be found to be an operator of a place of public accommodation.<sup>209</sup> Unlike the finding in *Cortez*, the *Bowers* court held that the NCAA was an operator of a place of public accommodation.<sup>210</sup> In finding so, the court relied on the fact that the NCAA's "operational control includes such matters as the selection of sites and dates for sports events, size of fields, ticket and seating arrangements, . . . use of athletic facilities; [and] playing rules in athletic facilities . . . ." <sup>211</sup> Using this rationale, it seems possible that a professional athlete could sue a professional sports league if he or she could allege that the league maintained similar operational control.

#### VIII. QUALIFYING PARTICIPATION SPORTS AS A "MAJOR LIFE ACTIVITY" UNDER THE ADA.

In order for a person with a disability to successfully sue under the ADA, the "disorder must satisfy the three necessary elements set out in the Act's definition of 'disability': (a) a 'physical or mental impairment' that (b) 'substantially limits' (c)

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203. See generally *id.*

204. See *id.* at 117.

205. See *id.* at 118.

206. 9 F. Supp. 2d 460 (D.N.J. 1998). *Bowers* involved a freshman college football player challenging the NCAA academic eligibility rules under the ADA and other legal theories. Like *Cortez*, much of the *Bowers* case focused on whether or not an organization governing a sports league, in this case the NCAA, could be considered a place of public accommodation.

207. *Id.* at 483.

208. See *id.*

209. See *id.*

210. See *id.* at 487.

211. *Id.* at 486.

a 'major life activit[y].'<sup>212</sup> Despite these requirements, courts in some jurisdictions have considered this test to be met solely by showing a physical or mental impairment.<sup>213</sup> In courts that require the fulfillment of all three factors, the definition of a major life activity may not be clear. "Although neither the [Equal Employment Opportunities Commission]<sup>214</sup> nor Congress provides criteria necessary for identifying a major life activity, the major life activities they have already recognized share three common characteristics."<sup>215</sup> These three characteristics are described as constituting a "Frequency-Universality Test."<sup>216</sup> An activity is said to meet this test if it is

performed: (1) with microfrequency: repeatedly throughout the day, if the activity is brief in duration; or for a large portion of the day, if the activity is of longer duration; (2) with macrofrequency: every day or nearly every day; and (3) universally: by nearly all persons, except those who are prevented from performing the activity by an ADA-defined "impairment."<sup>217</sup>

Participation in sports does not pass this test because participation in sports is not universally enjoyed by all persons.<sup>218</sup> In fact, even though "professional athletes . . . may participate in sports for a large portion of the day, every day, participation in sports must fail the universality test because unimpaired people commonly choose not to participate in sports."<sup>219</sup>

In *Martin II*, whether golf constituted a major life activity was not an issue, both because Martin's disability was a stipulated fact and because the court followed jurisdictions that found the existence of a disability where a mental or physical impairment did in fact exist.<sup>220</sup> This view leads to the possibility that in cases where the disability is not stipulated and where courts require that a plaintiff prove the disability without further requiring a showing that a major life activity is substantially limited, the professional athlete may run into difficulty.

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212. Todd Lebowitz, Note, *Evaluating Purely Reproductive Disorders Under the Americans With Disabilities Act*, 96 MICH. L. REV. 724, 728 (1997) (evaluating whether reproduction qualified as a "major life activity" under the ADA). Lebowitz's note discusses claims by persons against former employers for termination stemming from the excessive absences from work that often are an unavoidable result of the treatment options available to infertile couples.

213. See Lebowitz, *supra* note 211, at 728.

214. The Equal Employment Opportunity Commission (EEOC) was promulgated by the Civil Rights Act of 1964 and was designed to eliminate discrimination in employment. GILBERT LAW SUMMARIES, DICTIONARY OF LEGAL TERMS 41 (1st ed. 1993).

215. Lebowitz, *supra* note 211, at 741.

216. See *id.*

217. *Id.* at 741-42.

218. See *id.* at 743.

219. *Id.*

220. See generally *Martin II*.

## IX. CONCLUSION

Casey Martin's case has been decided, and today he is allowed to play professional golf with the help of a cart,<sup>221</sup> but the debate about what his case will mean to other professional sports remains.<sup>222</sup> This note has examined important elements of a viable ADA case, including a review of the definition of a public accommodation and the requisite showing of a major life activity. These elements seem difficult for a professional athlete to satisfy. Perhaps the most difficult hurdle that remains for a professional athlete suing a sports league under the ADA is the reasonable modification requirement.

Commentators have made suggestions about the negative effects they believe the *Martin* case will have on professional sports. Many of these arguments, however, are extreme. One article, for example, compares the ruling in *Martin* to a court forcing the NFL to enact a rule disallowing defensive players from tackling older quarterbacks.<sup>223</sup> That same commentator suggests that one-armed pitchers could possibly sue to force Major League Baseball to provide a "designated fielder."<sup>224</sup> Another article suggests that if Martin had been an NBA player with a similar disability, he could have possibly sued for the right to wear roller skates.<sup>225</sup> Such analyses, however, ignore the ADA requirement of a "reasonable modification."<sup>226</sup> Adding roller skates to an NBA game or disallowing the tackling of certain players would not seem to be reasonable modifications and would most certainly be fundamental alterations of the respective sports. Further, these comparisons are really attempts to equate the athleticism required in golf with that required in other professional sports. Quite simply, the legal courts and the court of public opinion are not likely to buy into that argument. The casual sports fan can see the difference in athleticism when watching a PGA Tournament as opposed to the Super Bowl.

Perhaps the difference between the PGA and other professional sports includes

221. See *Nike: Tour Championship*, WASHINGTON POST, Oct. 26, 1998, at C3. After the PGA's final event, Martin was ranked twenty-seventh on the PGA money list. He was to return to Qualifying School in order to attempt to earn the right to compete on the PGA Tour through his performance there. See also 'A Dream Come True,' CNN SI.com (visited Jan. 18, 2000) <[http://www.cnn.com/golf/news/2000/01/14martin\\_ap/index.html](http://www.cnn.com/golf/news/2000/01/14martin_ap/index.html)> (explaining that Martin subsequently finished fourteenth on the Nike Tour Money list in 1999. He thereby earned his PGA tour card for 2000 and was scheduled to compete in the *Bob Hope Classic* PGA Tournament beginning January 14, 2000).

222. Terence Moore, *Ruling Allowing Martin to Use Cart Disregards the Essence of Golf*, ATLANTA JOURNAL, Feb. 13, 1998, at E3.

223. See *id.*

224. *Id.* Moore evidently disregards the career of Jim Abbott. Abbott is a former United States Olympic baseball player and major league pitcher. Despite the fact that he was born without a right hand, Abbott became one of the young stars in Major League baseball in 1989, and threw a no-hitter against the Cleveland Indians as a member of the New York Yankees in 1993. See *Jim Abbot*, ESPN.com (visited Oct. 19, 1999) <<http://espn.go.com/mlb/profiles/notes/4308.html>>.

225. John Garrett, *Pro and Con, The Case Against Casey*, PRESS ENTERPRISE (Riverside, CA), Oct. 6, 1998, at C1 (arguing that the sympathy afforded to Martin by the court and others is due, in large part, to the fact that people do not understand that golf is much more physically draining than one might think).

226. 42 U.S.C. §12182(2)(A) (1994).

more than just the physical requirements. Golf also has a certain stigma attached to it as a game meant for white, upperclass males. In Martin's case, this stigma hurt the PGA in the public opinion forum, if not in the courtroom. When a spectator watches a golf tournament, this stigma is reinforced again and again. Spectators see competitors that are almost exclusively white males. Their dress, their speech, even their names (i.e. Davis Love III and Duffy Waldorff), all seem to reflect an extremely comfortable upbringing. Similarly, the products that professional golfers endorse and the sponsors of golf tournaments seem to reflect an upperclass flavor. These products include expensive automobiles such as Cadillac and Lexus, while sponsorships include stock markets and investment firms.

Even the game of golf, while enjoyed by the average American, is tainted with a certain snobbery. Many golf courses are private clubs where only members may play. There are some clubs that still exclude people on the basis of race, sex, and creed. Other clubs allow women to play, but reserve certain desirable "tee times" for men; the rationale being that women have all day to find a time to play, while men must go to work. Even public courses, golf courses where anyone can play, are expensive to play when considering cart rental fees and course fees. The equipment necessary to play golf is among the most expensive of all sports. An individual golf club can cost well over one hundred dollars and so, too, can the proper shoes and golf bag. In short, playing golf can amount to a great expense even when played at a public course.

The expense involved in playing golf and the image of golf as a game for the privileged has harmed the popularity of professional golf in the past. Other sports can champion their diversity, and there is an abundance of stories where young athletes have literally gone from "rags to riches." In professional baseball, football, and basketball, players of various ethnic backgrounds have thrived economically. Some of the greatest heroes in those sports are considered even greater for their diversity, whether it be baseball player Sammy Sosa's pride in his Dominican Republic homeland or the NBA's Tony Kukoc, who plays professional basketball in the United States but competes against his U.S. teammates in the Olympics when he plays with his native Croatia's team. Spectators look at these sports and see wealthy athletes just as they do with the PGA. In these sports, though, they see players of many different ethnic, economic, and social backgrounds who have sometimes escaped violent and hostile neighborhoods through their athletic abilities.

The average American sports spectator can more easily identify with these athletes than they can the PGA players who seem to have all gone to the same schools and come from the same sort of families, in the same upperclass neighborhoods. A preference for watching athletes who "look more like America" was apparent with the rise of Tiger Woods' popularity. Woods, a golfer of quite diverse ethnicity, became an instant favorite in the United States and worldwide. Part of his fame, no doubt, came from his enormous success on the golf course with his amateur and PGA accomplishments. There are many golfers, however, who had even greater success

than this young golfer, and they have not enjoyed near the popularity and financial success that Woods has in his short career. A great deal of Woods's popularity stems from the fact that he looks different from other golfers and comes from a different background. He is young, enthusiastic, and vocal about his performance as a golfer. Woods brought a freshness to the PGA that it was desperately seeking. The PGA welcomed Woods' popularity enthusiastically and reaped the benefits of his presence, just as Woods enjoyed enormous financial success through his endorsement deals with giant companies such as Nike and American Express.

The PGA's popularity also rose with the arrival of Woods to the PGA Tour. His success inspired many to take up golf, even those who had never thought of playing the game before. Many of these players included persons of different races and economic backgrounds. The PGA embraced Woods and the increase in popularity he brought that organization. Although, the PGA would not so readily embrace another golfer who was a little bit different. The fact that the PGA chose to fight Martin in his desire to use a golf cart puzzled many PGA fans and commentators. For many observers, the simple solution was to allow an exception for Martin due to his condition. The PGA, however, decided to challenge Martin on the issue of allowing him to use a cart. It would seem that, after the success of Woods, the PGA would warmly welcome a golfer who was different. At a time when the PGA was enjoying a popularity it had not seen in a long time, it may have done well to accommodate Martin. Instead, the PGA took a hardline stance and, in the process, angered many of its fans, commentators, and those who were not fans of the PGA precisely because the association seemed so intolerant of those who were different. Martin instantly acquired the sympathy of golfers, commentators, and fans. The PGA, perhaps foolishly, thought that their position would be backed by the public or, at least, would go relatively unnoticed. Unfortunately for the PGA, the court of public opinion was dramatically in favor of Martin.

Courts are supposed to make their decisions without regard to public opinion. That is a premise that perhaps is only a reality in textbooks. The court in *Martin*, however, had to employ a common sense analysis in order to analyze whether or not Martin's request was a reasonable one. When a court engages in such an analysis, it is nearly impossible to do so without examining how the sport and the nature of that sport are perceived in the public eye. The court found that walking was not an integral part of the game, but it remains difficult for an athlete-plaintiff to convince a court that running down the court in the NBA or being able to make physical contact with all players on the field are not integral parts of NBA and NFL games. The PGA's position was flawed from the moment that it attempted to argue that walking is an integral part of the game. In rendering an opinion on this issue, a court really has no means of examining the truth of such a proposition other than applying the common sense analysis that an ordinary sports fan would apply. The inherent differences between a sport enjoyed by persons of all ages and abilities such as golf versus sports such as football, basketball, baseball, and hockey, which are dominated by some of the greatest athletes in the world, simply make it impossible to compare

golf to more vigorous sports. Therefore, the argument that the *Martin* case will have a detrimental effect on other sports is not supported by either the public's or the court's analyses. Public policy and common sense must control this debate, and will no doubt continue to do so.<sup>227</sup>

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227. Since the writing of this note the United States District Court for the Northern District of Indiana heard another case involving the application of the ASA to professional golf. *See generally* *Olinger v. U.S. Golf Ass'n*, 55 F.Supp.2d 926 (N.D. Ind. 1999). In *Olinger*, the court denied professional golfer Ford Olinger's request to use a golf cart in a qualifying event for the United States Open. Olinger suffers from a degenerative hip disorder which makes it extremely difficult for him to walk eighteen holes. U.S. District Judge Robert Miller ruled that the United States Golf Association was an operator of a place of public accommodation. However, the court found that allowing Olinger to use a cart would fundamentally alter the tournament. The *Olinger* court was much more responsive to the "competitive advantage" argument regarding the use of a golf cart than was the court in *Martin*. A substantial difference between the two cases arose when the *Olinger* court excluded the testimony of Dr. Gary Klug, a key witness in the *Martin* case. *See generally* *Olinger v. U.S. Golf Ass'n*, 52 F.Supp.2d 947 (N.D. Ind. 1999).